

Employment Rights of Persons Discharged from Military Service

Introduction

Many men and women who joined the military service to protect this country are now returning home and attempting to re-integrate into civilian life. Of particular concern to them, is their ability to return to the jobs they left upon enlisting.

This pamphlet is designed to answer common questions regarding what re-employment rights these individuals have.

Q. I have recently returned home after being discharged from military service. Do I have any legal rights to return to the job that I left upon enlisting?

Both Federal and State laws provide that *eligible persons in military service* may regain their former jobs after they have returned from military service.

The Federal Law is known as the *Uniformed Services Employment and Reemployment Act of 1994 (USERRA)*, 38 USCA Section 4301(2003)..

The State Law is known as the *Service Men's Employment Tenure Act*, 330 ILCS 60 (2003).

This pamphlet addresses the protections afforded by the State law (hereinafter referred to as "the Act"). For further information about the federal law you can log on to <http://www.dol.gov/elaws/vets/userra>.

Q. Who are considered *persons in military service* under the Act?

All Illinois residents who are members of the United States Army, Navy, Marines, Air Force, Coast Guard and all members of the State Militia are considered *eligible persons in military service*.

Q. Which employers are covered under the Act?

The state law covers all private employers in Illinois as well as the State of Illinois and any unit of local government (ie: counties, townships and municipalities) as well as school districts.

Moreover, Illinois public employers are also governed by the *Local Government Employees Benefits Continuation Act* (50 ILCS 140 (2003)), the *Public Employee Armed Services Rights Act* (5 ILCS 330 (2003)), and the *Military Leave of*

Absence Act (5 ILCS 325/1 (2003)) which provide additional protections to Illinois public employees who belonged to the armed services reserve or the Illinois National Guard or any branch of the Armed Forces Reserve and are placed on active duty status. Those laws provide that public employers must grant employees leave from their public employment for any period actively spent in military service. Moreover the employer must continue to compensate employees on military leave for wages and benefits that exceed their military base pay, unless any provision of a collective bargaining agreement or policy of the employer is more generous, in which case the more generous provision controls.

Q. Are there any employees to whom this Act would not apply?

Yes. If the position you held upon enlisting was a position in the Executive Branch of State government which principally involved responsibility for the determination of policy or the way it is carried out, the protections of this Act do not apply to you.

Q. What do I need to establish in order to qualify for protection under the Act?

In order to be protected under the state law you must have been:

- 1) employed by
 - a) a private employer in Illinois;
 - b) the State of Illinois; or
 - c) any unit of local government (ie: county, township, municipality) or a school district;
- 2) left that employment for the purposes of entering military service;
- 3) in fact entered the military service;
- 4) received an honorable discharge or otherwise satisfactorily completed your military service;
- 5) at the time of such discharge or completion of military service, were still qualified to perform the duties of the position of employment which you left, and
- 6) made an application for re-employment within 90 days after you were relieved from military service, unless at the time of your discharge you were hospitalized as a result of your military service, in which case the time within which to apply for re-employment is extended.¹

¹ If you were hospitalized as a result of your military service and that hospitalization continues after your discharge, you have 90 days after you are released from hospitalization to apply for re-employment, provided the hospitalization does not exceed one year.

Q. Am I still covered if I left my job and enlisted in the service but was later rejected by the service?

Yes. As long as you were not dishonorably discharged, you are covered under both of the Act.

Q. Does the Act still protect me if I was not a regular employee but rather a temporary or casual worker?

No. The protections provided by this Act do not apply to workers employed on a temporary or casual basis.

Q. Is there a time limit by which I must seek re-employment?

Yes, generally under the Act, you must make an application for re-employment within 90 days after you are relieved from military service or within 90 days after you receive an official notice of rejection.

Q. Is the employer required to hold my position open indefinitely?

No. Generally, the law provides that an employer must re-employ an employee whose service in the armed forces did not exceed five years, provided the employee gave his employer advance notice of the term of his service. In some limited instances, the protection may extend beyond five years.

Q. At the time of my discharge I was hospitalized with a service related injury, do I still need to apply for re-employment within 90 days from the date of my discharge?

No. If at the time of your discharge you were hospitalized with a service related injury, you have 90 days after your release from the hospital to apply for re-employment provided however, that the hospitalization does not exceed one year.

Q. What position am I entitled to when I apply for re-employment?

Under the Act, if you apply for re-employment within the requisite time, your employer is required to restore you to the position of employment which you left *with the same increases in status, seniority and wages* that were earned during your term of military service by employees in similar positions who were on the job at the time you entered the service or to a position of like seniority, status and pay, *unless your employer's circumstances have so changed as to make it impossible or unreasonable to do so.*

Q. What if I am no longer able to perform the job I had prior to enlisting, due to a disability sustained during my military service?

Under the Act, as long as you are able to perform the duties of any other position, your employer is required to place you in such other position the duties of which you are qualified to perform and which will provide you with like seniority, status and pay or the nearest approximation thereof given your circumstances, *unless your employer's circumstances have so changed as to make it impossible or unreasonable to do so.*

Q. What circumstances would my employer have to demonstrate in order to be relieved from the obligations imposed under this Act?

Those circumstances are determined on a case by case basis, but the burden is on the employer to demonstrate the changed circumstances and the impossibility or unreasonableness of re-employing you.

Q. What if, upon entering military service, my position is filled by another employee who later enters military service? How is my employer required to allocate positions?

Employees shall be given preference in employment in the order in which they entered military service and the employer is not required to retain more than one of the employees in his employ.

Q. Do I have any protection against my employer discharging me once I am re-employed?

Yes. You may not be discharged from your position *without cause* within one year after being re-employed.

Q. For purposes of any employee benefits, how should my employer treat my enlistment and resulting absence from work?

The Act provides that during the time you are in the military, your employer should consider you to be on a furlough or leave of absence from your job. Moreover, you should be restored to your employment without loss of seniority and you are entitled to participate in insurance or other benefits offered by the employer pursuant to any rules the employer has with respect to employees on furlough or leave of absence in effect at the time you entered military service.

Q. What rights, if any, do I have to health coverage through my employer upon being re-employed?

If your employer provides health insurance, he cannot impose an exclusion or waiting period in connection with coverage of a health or physical condition of

any person entitled to participate in that insurance if: 1) the condition arose before or during your period of military service; 2) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from your participation in the insurance; and 3) your condition has not been determined to be service connected.

Q. How do I enforce my rights under the Act?

If your employer has refused to re-employ you, you may enforce your rights by filing a lawsuit against your employer with the circuit court in the county where your employer has his place of business or if you are a State employee, the county where you perform most of your duties.

Q. If I am successful in a lawsuit against my employer, what legal remedies would I be entitled to?

You are entitled to be compensated for any loss of wages or benefits you experienced as a result of your employer's refusal to re-employ you. You are also entitled to reasonable attorney's fees. Moreover, you will not be charged any fees or court costs for filing your suit.

Q. I understand that lawsuits take a long time, when can I expect a court to hear my case?

The law mandates that the court give preference to the hearing and disposition of these cases over and above other cases pending before it.